Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-575

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY McCLELLAN,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR RESPONDENT

85pp

QUESTION PRESENTED

1. Does the refusal of Dorothy McClellan's petition for appeal by the West Virginia Supreme Court of Appeals constitute a "final judgment or decree" as required by 28 U.S.C. § 1257?

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JURISDICTION

The State does not take issue with the assertions concerning jurisdiction made by the petitioner, except that, since the time the Petition for Writ of Certiorari was filed, petitioner received some relief on her Motion for New Trial from the West Virginia Supreme Court of Appeals. It is the State's position that said relief affects this Court's jurisdiction under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

> question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The state is in substantial disagreement with the petitioner regarding the facts as proven at appellant's trial. However, for the purposes of this Brief in Opposition, it is the position of the state that the proceedings at petitioner's trial are irrelevant here.

SUMMARY OF ARGUMENT

(a) This Court may review on certiorari only "final judgments or decrees" of a state's highest court. Due to a remand to the Circuit Court of Jefferson County by the West Virginia

Supreme Court of Appeals of petitioner's Motion for New Trial, petitioner still has the opportunity to prevail in state court, regardless of the validity of earlier state court rulings on the federal issues raised in her petition. For this reason, this Court lacks jurisdiction over this matter.

REASONS FOR DENYING THE WRIT

THE REFUSAL BY THE WEST VIRGINIA SUPREME COURT OF APPEALS TO ACCEPT DOROTHY McCLELLAN'S PETITION FOR APPEAL WAS NOT A FINAL JUDGMENT OR DECREE DUE TO THE SUBSEQUENT ACTIONS OF THAT COURT.

On June 11, 1986, the West Virginia Supreme Court of Appeals refused to consider Dorothy McClellan's petition for appeal. The West Virginia Supreme Court of Appeals is granted the discretion to accept or deny all appeals by the state constitution. Article VIII,

Section 4, of the West Virginia Constitution.

Following this denial, and the denial of a subsequent Motion for Reconsideration, petitioner filed a Motion for New Trial with the trial court on or about July 16, 1986. (A. 1-3) The grounds asserted were that petitioner had uncovered new evidence that Stuart and Leslie Green, the parents of the victim, had testified against her because of an arrangement between the Greens and the West Virginia Department of Human Services. This alleged arrangement required the Greens to testify against petitioner in exchange for the return of custody of their daughter Julie by the West Virginia Department of Human Services. (A. 4-7)

On October 20, 1986, the Honorable Fred Fox, Circuit Judge, ruled that he had found no evidence of such an arrangement based upon his review of the relevant records of the West Virginia Department of Human Services, and that the motion was therefore denied. (A. 8-17) Petitioner appealed this ruling to the West Virginia Supreme Court of Appeals on October 21, 1986 (following the filing of the Petition for Writ of Certiorari in this Court). (A. 18-68) The Supreme Court of Appeals treated the matter as a writ of habeas corpus, and returned it to the circuit court "for the purposes of permitting counsel to examine the Department of Human Services records." (A. 69-70)

It is apparent that petitioner has not yet received a "final judgment or decree" as required by 28 U.S.C. § 1257,

and that therefore this Court lacks jurisdiction to hear this matter. Should petitioner uncover evidence requiring a new trial, there would be no need at this point for review of the federal constitutional issues raised in her petition. Should her Motion for New Trial ultimately be denied, she would have the opportunity to raise the federal issues at that time. Either way, the acceptance of certiorari at this time is not appropriate.

There are, of course, a few limited exceptions to the "final judgment" requirement. These exceptions, as outlined in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), fall into four (4) categories: (1) "where * * * the federal issue is conclusive or the outcome of further proceedings

preordained," 420 U.S. 479, 43 L. Ed. 340; (2) where "the federal issue * * * will survive and require decision regardless of the outcome of further state court proceedings," 420 U.S. 480, 43 L. Ed. 2d 340; (3) "where the federal claim has been finally decided, with further proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," 420 U.S. 481, 43 L. Ed. 2d 341; and (4) "where the federal issues has been finally decided * * * with further proceedings pending * * * and where reversal of the state court on the federal issue would be preclusive of any further ligitation," 420 U.S. 482-483, 43 L. Ed. 2d 342. None of these exceptions apply to this case.

The decisions by the state courts here on the federal issues are not "conclusive" nor is the outcome of petitioner's motion for new trial "preordained." She may prevail on non-federal grounds in state court on her Motion for New Trial, should she be able to in fact produce evidence which was unknown to her at the time of her trial. Should she be granted a new trial, the federal issues would not survive "regardless of the outcome of further state proceedings," as a new trial could result in an acquittal. If petitioner does not receive a new trial, or if she is convicted after a new trial, she will then still be able to raise the federal issues presented in her Petition for Writ of Certiorari, so this is not a case "in which later

review of the federal issues cannot be had."

Finally, a reversal of the state courts on the federal issues would not preclude the state from retrying petitioner, as such a reversal would only place some limitations upon the evidence presented by the state at such a trial.

A judgment is not reviewable by certiorari "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 89 L. Ed. 2d 2092, 65 S. Ct. 1475 (1945).

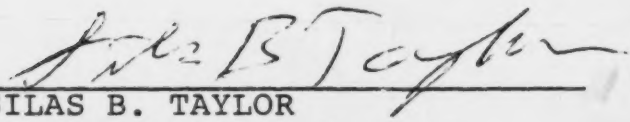
CONCLUSION

Because the proceedings currently pending in state court may render the federal issues moot, and because this

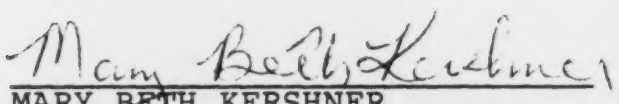
case does not fall within any of the limited exceptions to the finality rule of 28 U.S.C. § 1257 recognized by this Court, there is no jurisdiction for the review of the federal issues on certiorari by this Court.

Respectfully submitted,

CHARLES G. BROWN
Attorney General



SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record



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APPENDIX

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

VS. CRIMINAL NOS. 84-F-58 & 84-M-3

DOROTHY McCLELLAN,

DEFENDANT

MOTION FOR NEW TRIAL

NOW COMES THE DEFENDANT, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure, and moves the Court to award her a new trial on the ground of newly discovered evidence. Said newly discovered evidence is as follows:

On the ____ day of February, 1986, this Court Ordered, without objection by the State, that the custody and control of Julie Green, infant, be returned to her natural parents, Stuart and Leslie Green. At the trial in this matter

before the jury on November 7, 1984, through November 9, 1984, witnesses, Leslie Green, Stuart Green, and Jan Adams, testified that there was no arrangement concerning the return of Julie Green to the custody of Stuart and Leslie Green. (Tr. pp. 505-506, 517, 568-569, 604.)

Defendant moves the Court for an evidentiary hearing concerning the circumstances of the State of West Virginia agreeing to return Julie Green to the custody of Stuart and Leslie Green. Defendant further moves the Court for a written transcript of all proceedings regarding the return of Julie Green to the custody of Stuart and Leslie Green.

The Defendant says that information regarding the arrangement for the return of Julie Green to the custody of Stuart

and Leslie Green was discovered by her since the trial; that the evidence is material; that the evidence is such as ought to produce an opposite result at a second trial on the merits.

DOROTHY McCLELLAN
BY COUNSEL

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September 10, 1986

The Honorable Fred Fox, II
Judge - 16th Judicial Circuit
P. O. Box 629
Fairmont, WV 26554

RE: State vs. Dorothy McClellan

Dear Judge Fox:

I received the transcript of the entire trial on Friday, the 5th day of September, 1986.

I think it is important when you consider the testimony of the witnesses that you do so in light of the Motion for Discovery and the response thereto that was filed and argued in the case pre-trial. I would submit the case file will reflect a Motion for Discovery

asking for that very type of impeachment evidence that I submit existed. It is in light of the discovery that we did receive, as well as what we didn't receive that the testimony of the witnesses should be considered. I would submit that if a hearing is held, the evidence will demonstrate that when the Greens changed attorneys, conversations began between their new attorney, the prosecutor, and the Department of Human Services pertaining to how the Department of Human Services would proceed against the Greens and their daughter, Julia. In that the State not only denied this pre-trial during the trial, the jury was mis-led by that testimony of Jan Adams and my cross-examination was adversely affected. The cross-examination of Jenny Slosher at page

328, Stewart Green beginning at page 510, and Leslie Green beginning at page 596 would have been materially different had I been given discovery material as to conversations, discussions, or understandings that were on-going and had been reached before the trial or while the trial was in progress. When Jan Adams testified as she did beginning at page 567, it would have been a futile waste of my time to attempt to call her a liar without the discovery material.

Therefore, I think the Court needs to consider whether the State withheld discovery that was specifically requested long before the trial commenced that would have materially affected how I would have developed my cross-examination, as well as calling witnesses such as Dennie Pentony and/or

Mr. Woods and would have led to a probing, in-depth cross-examination of Jan Adams to demonstrate that she was not full, complete, and accurate in her testimony.

I hope that your examination of these witnesses' testimony in this light will convince you that Mrs. McClellan is entitled to a new trial.

Sincerely,

/s/ Steven Askin

Steven M. Askin
Attorney-at-Law

SMA:pjb

cc: Michael Thompson, Prosecuting Attorney for Jefferson County
Dorothy McClellan

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS. CASE NO. 84-F-58 & 84-M-3

DOROTHY MCCLELLAN,

DEFENDANT

O R D E R

This 1st day of August, 1986, came the State of West Virginia by Jefferson County Prosecuting Attorney, Michael Thompson, and came the defendant in person and by counsel, Steven M. Askin, all appearing this day before the Honorable Fed Fox, Special Judge selected by the Supreme Court of Appeals to preside in this matter.

Thereupon, the Court proceeded to consider Defendant's motion to set aside the verdict of the jury on the grounds of newly discovered evidence and upon

counsel for Defendant explaining to the Court the necessity for review by either counsel for the Defendant and/or the Court of the records of the West Virginia Department of Human Services regarding whether or not there were on-going negotiations regarding whether the infant, Julia Green, should be returned to her natural parents or the parents of Stewart and/or Leslie Green as reflected by written documents contained in the Department of Human Services file and due to the voluminous records that were brought this day to Court by a representative of the Department of Human Services pursuant to a subpoena duces tecum issued from the Office of the Clerk of this Court, it is the opinion of the Court to continue all matters regarding the motion to set aside the verdict on the grounds of

newly discovered evidence to permit the Court to receive copies of all Welfare Department records involving the dependent and neglect proceeding of Stewart and Leslie Green and the infant child, Julia Green, and that copies of the records be provided to the Court in Fairmont, West Virginia, following which the Court will examine same to determine whether or not there are any letters, correspondence, written records, or other documents or memorandum reflecting discussions about and/or understandings reached about the transfer of custody of the infant child, Julia Green, to her parents prior to the trial of the Defendant, which occurred on the 7th day of November, 1984, to which action of the Court the State objected and excepted.

Thereupon, counsel for Defendant moved the Court to continue Defendant's bail until the issue of whether a new trial should be awarded to the Defendant on newly discovered evidence, which motion for continued bail was objected to by the State and it is the opinion of the Court to grant said motion to continue bail for a period of forty-five (45) days from this date to permit the Court to review the records and documents of the Department of Human Services and thereafter notify counsel for the Defendant and counsel for the State whether an evidentiary hearing will be necessary on the issues raised by said motion.

Thereupon, the Court proceeded to consider the motion to reduce sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure and

received into evidence letters written by the Defendant's children and upon receiving argument by counsel for the Defendant and counsel for the State, and upon the Defendant exercising her rights to allocution, the Court will reserve ruling on the motion to reduce sentence pending an opportunity to review the letters of the Defendant's children offered and accepted into evidence this day and it is the opinion of the Court to enter an Order regarding whether a new trial should be awarded and/or further hearings be held upon said motion for new trial and whether the Defendant's motion to reduce sentence should be granted and that a copy of said order will be provided to counsel for the Defendant and counsel for the State, notifying the Defendant of the Court's ruling.

The Clerk shall enter the foregoing as of the day and date first above written.

/s/ Fred Fox, II
THE HONORABLE FRED FOX, JUDGE

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS. CRIMINAL ACTION NO. 84-F-58
83-M-5

DOROTHY McCLELLAN,
Defendant.

ORDER

THIS MATTER came on to be heard the ___ day of _____, 1986, upon the papers and proceedings formerly read and had herein; upon the Defendant's Motion For A New Trial (on the ground of newly discovered evidence); upon the Defendant's Motion To Reduce Sentence; upon the hearing of said motions on August 1, 1986, upon the proffered documents; upon the arguments of counsel; upon the production of a large file by the Department of Human Services of numerous documents concerning "Stonegate" abuse and neglect matters; upon the Court

reviewing copies of all of the documents contained in said file for any indication that there was an 'arrangement' concerning the return of Julie Green to the custody of her parents in return for the parents' testimony for the State.

In consideration of all of which the Court did find no evidence that the Department of Human Services had ever discussed with Stuart Green or Leslie Green their testimony against the Defendant Dorothy McClellan or any arrangement, promise or commitment concerning the same; and the Court did find no basis to believe that the denials by Stuart Green and Leslie Green of any arrangement were anything less than truthful; and that the Court did find no newly discovered evidence which would warrant granting of a new trial.

Accordingly the Defendant Dorothy McClellan's Motion For A New Trial is ORDERED denied and the Defendant's objection and exception noted.

In consideration of the Defendant Dorothy McClellan's Motion To Reduce Sentence upon the statements of the Defendant's children submitted in support of said motion and the statement made by the Defendant Dorothy McClellan in open court in support thereof and the arguments of counsel, the Court did find no reasons to change the sentence as previously imposed.

Accordingly the Defendant Dorothy McClellan's Motion To Reduce Sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure is hereby ORDERED denied to which denial the Defendant's objection and exception is noted.

In consideration of all of which it is by the Court ORDERED that the Defendant Dorothy McClellan shall surrender herself to the Sheriff of Jefferson County, West Virginia on October 15, 1986 at 9:00 A.M. for incarceration and subsequent transfer to the State Penitentiary For Women at Alderson, West Virginia.

The Clerk will enter the foregoing as of the day and date first above written and shall transmit attested copies to all counsel of record.

/s/ Fred Fox, II
JUDGE

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA AT CHARLESTON

STATE OF WEST VIRGINIA,

VS.

DOROTHY McCLELLAN,

PETITIONER

NOTICE OF FILING PETITION FOR APPEAL
AND MEMORANDUM OF ARGUMENT AND
TRANSMISSION OF RECORD TO THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

TO: The Honorable Doris Whiting
Clerk of the Circuit Court
of Jefferson County, West Virginia

and

Michael Thompson, Prosecuting
Attorney for Jefferson County,
West Virginia
County Building
Charles Town, WV 25414

You are hereby respectfully notified that the Petition for Appeal and Memorandum of Argument has been filed with the Clerk of the Circuit Court of Jefferson County, West Virginia, and the Clerk is requested to

forward the Petition, Memorandum of Argument, and Petition for Bond to the Supreme Court of Appeals of West Virginia, pursuant to law.

/s/ Steven M. Askin/pjb
Steven M. Askin

/s/ David P. Greenberg
David P. Greenberg

IN THE SUPREME COURT
OF
APPEALS OF WEST VIRGINIA
CHARLESTON

STATE OF WEST VIRGINIA,

PLAINTIFF/RESPONDENT

VS.

DOROTHY McCLELLAN,

DEFENDANT/PETITIONER

PETITION FOR APPEAL

Your Petitioner, Dorothy McClellan, respectfully represents and says unto Your Honors that she is prejudiced and aggrieved by the judgment of the Circuit Court of Jefferson County, West Virginia, rendered in the above-entitled case on the 24th day of September, 1986, denying her motion for new trial based on newly discovered evidence. The rulings and decisions of the Circuit Court and the exceptions taken by Petitioner and her counsel upon which

your Petitioner relies for the reversal of the judgment claimed of herein are herewith filed and asked to be taken as part of this Petition. If this Honorable Court grants this Petition for Appeal, it is respectfully prayed for a stay and bail to be awarded to your Petitioner pending the outcome of the appeal.

The Petition for Appeal is being filed pursuant to Rule 4(a) of the West Virginia Rules of Appellate Procedure.

IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA
CHARLESTON

STATE OF WEST VIRGINIA,

PLAINTIFF/RESPONDENT

VS. CASE NO.

DOROTHY McCLELLAN,

DEFENDANT/PETITIONER

STATEMENT OF THE CASE

On October 5, 1982, Joseph Green, a two year old boy, died as a result of his father, Stewart Green, spanking him for approximately two hours with a wooden paddle. Immediately after Joseph Green's death, the West Virginia Department of Human Services (hereafter referred to as "DHS") began a child abuse/neglect investigation involving all "Stonegate" parents and their respective minor children, including Stewart and Leslie Green's minor children, Tiffany Green and Julie Green.

(State of West Virginia vs. Jacob Fansler, Infant, et al, Child Abuse/ Neglect Petition No. 83-J-24)

Thereafter, a Jefferson County Grand Jury indicted Petitioner for the charge of conspiracy to commit unlawful wounding, conspiracy to commit involuntary manslaughter, and involuntary manslaughter.

On November 7, 1984, through November 10, 1984, Petitioner was tried before the Honorable Fred L. Fox, II, Judge, and a petit jury. The jury returned a verdict against your Petitioner of guilty to involuntary manslaughter and guilty of conspiracy to commit unlawful wounding.

On March 1, 1985, Petitioner was sentenced to not less than one nor more than five years upon her conviction for the offense of conspiracy to commit

unlawful wounding and sentenced to be confined to the Jefferson County Jail for twelve months upon her conviction for the offense of involuntary manslaughter. Both sentences are to run concurrently.

On June 11, 1986, this Honorable Court denied Petitioner's Petition for Appeal. On July 15, 1986, this Honorable Court denied Petitioner's Motion to Reconsider her Petition for Appeal.

On July 16, 1986, Petitioner filed a motion for new trial based on newly discovered evidence. (attached hereto as exhibit A.) The motion for new trial concerned "DHS" documents proving that [State] witnesses Stewart Green, Leslie Green, and "DHS" social worker, one, Jan Adams each testified falsely when cross

examined regarding whether any arrangement existed between the Green's counsel and the "DHS" concerning the Greens gaining custody of Julia. Leslie Green, Stewart Green, and Jan Adams each testified at trial that there was no such arrangement. (Tr. pp. 505-507, 517, 568-569)

Before trial, Petitioner filed a discovery motion requesting, inter alia, any conversations, discussions, promises, inducements, or understandings that were on-going that had taken place before trial or while the trial was in progress. After the trial, Petitioner received information that "DHS" documents styled memorandum dated November 9, 1984, recording log dated October 15, 1984, recording log dated November 30, 1984, support her accusation that prior

to trial there existed on-going negotiations between the Green's attorney, the prosecutor, and the "DHS" concerning returning Julie Green to her parents custody.

On August 1, 1986, the trial court agreed to review the "DHS" records to determine whether there existed on-going negotiations at the time of the trial between the State and the Green's concerning returning Julie Green to her parents custody. Further, if such negotiations existed whether that supports awarding Petitioner a new trial. (August 1, 1986, Order attached hereto as exhibit B) Over Petitioner's objection, the trial court refused to allow Petitioner's counsel access to the records, therefore Petitioner's counsel was unable to argue why the records support the motion for new trial.

On September 24, 1986, the trial court held that a review of the "DHS" records revealed no evidence that the "DHS" had ever discussed with Stewart or Leslie Green their testimony as to Petitioner, much less any arrangement, promise, or commitment concerning same. The trial court found no newly discovered evidence that would warrant the granting of a new trial. (September 24, 1986, Order attached hereto as exhibit C)

On October 6, 1986, the trial court granted a stay of execution of sentence until February 13, 1987, however Ordered that the Defendant report to the Sheriff of Jefferson County on October 15, 1986, to be held in the Jefferson County Jail pending her Petition for Appeal.

Wherefore, your Petitioner prays for this Honorable Court to reverse the

trial court's Order of September 24, 1986, denying her motion for new trial based on newly discovered evidence.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO AWARD A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Immediately after the October 5, 1982, tragic death of Joseph Green, the "DHS" began a Child Abuse/Neglect investigation involving all Stonegate parents and their respective minor children, including Stewart Green and Leslie Green's minor children, Tiffany Green and Julia Green. (State of West Virginia vs. Jacob Fansler, Infant et al., Child Abuse/Neglect Petitioner 83-J-24) At the time of Petitioner's trial the "DHS' maintained legal custody of Julie Green.

Before trial, Petitioner filed a discovery motion requesting, inter alia, any conversations, discussion, promises, inducements, or understandings made to [government] witnesses in exchange for their testimony. The State denied any such information existed.

On July 16, 1986, Petitioner filed a motion for new trial alleging certain "DHS" documents exist that prove [government] witnesses Stewart Green, Leslie Green, and "DHS" social worker, one, Jan Adams each testified falsely during cross examination by denying negotiations existed between the Green's attorney and the "DHS" concerning returning Julia Green to her parents custody. (Tr. pp. 5050-507, 517, 568-569) "DHS" documents prove Petitioner's accusation: memorandum dated November 9, 1984; recording log dated

October 15, 1984; and recording log dated November 30, 1984.

Petitioner's motion for new trial based on newly discovered evidence should also encompass what Petitioner calls the "new story" told to Petitioner's counsel for the first time on the first day of trial. At that time Petitioner's counsel was informed by the State that Stewart Green and Leslie Green had just revealed new evidence. (Tr. pp. 142-143) The evidence was that approximately one week before the death of Joseph Green, your Petitioner's son had beaten his son in a like or similar manner, and that following the beating the other individuals who lived at "Stonegate" discussed the beating and agreed to cover up the incident. Your Petitioner was also supposed to have made a statement to Leslie Green that

one day she would have to go through something like this with her son Joseph, the deceased.

Over Petitioner's objection, Stewart Green testified that Petitioner's son had beaten his son and that everyone in the Stonegate residence agreed that it was good that the infant child had been struck. (Tr. pp. 492-493, 509) Leslie Green on direct examination also offered testimony about this incident. (Tr. pp. 585-588)

The State by failing to disclose that negotiations had begun simultaneous with the disclosure of the "new story" between the Green's new counsel and the State of West Virginia deprived Petitioner's counsel of a significant area of cross examination and denied the jury the right to weigh the credibility of the "new story" against what your

Petitioner says was the Green's real inducement to make up such testimony.

In asking this Court to decide whether the trial court erred in failing to award a new trial on the ground of newly discovered evidence, Petitioner requests the Court to review the general rule in West Virginia regarding newly discovered evidence and the recent United States Supreme Court decision of United States vs. Bagley, ___ U.S. ___, 105 S.Ct. 3375 (1985).

In West Virginia the general rule regarding newly discovered evidence is set out in the lone syllabus point in State vs. Farley, 143 W. Va. 445, 104 S.E.2d 265 (1958), syllabus point ten of State vs. Hamrick, 151 W. Va. 1, 151 S.E.2d 252 (1966), syllabus point two of State vs. Wolfe, 277 S.E.2d 640 (W.Va., 1981), syllabus point two of State vs.

Stewart, 161 W.Va. 127, 239 S.E.2d 777 (1977), and syllabus point one of State vs. King, 313 S.E.2d 440 (W.Va., 1984):

> "A new trial will nct be granted on the ground of newly discovered evidence unless the case comes within the following rules: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be or its absence satisfactorily explained. (2) It must appear from the facts stated in his affidavit that Plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side."

In the case at bar the newly discovered evidence falls within the rules listed above to support Petitioner being awarded a new trial:

(1) After Petitioner's trial, she received the information that "DHS" documents indicate that prior to trial the Green's attorney and the "DHS" were negotiating the return of Julia Green to her parents custody. Both prior to trial and during trial the State denied any such negotiations existed.

(2) Petitioner could not have ascertained prior to trial that State witnesses testified falsely by denying negotiations existed concerning returning Julie Green to her parents custody. Therefore, Petitioner used due diligence in securing the new evidence.

(3) The new evidence concerning the on-going negotiations regarding the

return of Julia Green to her parent's custody is new and material evidence; that for the reasons set forth in number four is sufficient evidence to award Petitioner a new trial.

(4)&(5) Petitioner shall address rules four and five together. The newly discovered evidence ought to produce an opposite result at a second trial on the merits. Petitioner's counsel's cross examination of Stewart Green, Leslie Green, and Jan Adams was adversely affected in a material way by the State's failure to disclose that Stewart Green and Leslie Green through their new counsel had entered negotiations with the State to reclaim custody of Julia Green. By not disclosing the on-going negotiations, Petitioner was prevented from arguing to the jury that the Greens inducement to regain custody of their

infant child was the reason why on the first day of trial they told the "new story".

Petitioner also submits that the State's failure to disclose on-going negotiations between the Greens and the State deprived Petitioner of the following relevant and material evidence: First, that Leslie Green and Stewart Green were influenced and induced by the State as to their overall testimony by the realistic hope and expectation that these negotiations would help them regain custody of their child; Second, the on-going negotiations may have induced Leslie Green and Stewart Green to invent the "new story" that was first told simultaneously with the commencement of the negotiations; Third, Petitioner's counsel's ability to effectively cross examine Leslie Green,

Stewart Green, and Jan Adams regarding their denial of on-going negotiations as well as Petitioner being in a position to call witnesses such as Dennis Pentney, supervisor of the "DHS" investigation, and/or Mr. Richard Woods, the Green's new attorney, to impeach the testimony of Leslie Green, Stewart Green, and Jan Adams denying on-going negotiations existed. Fourth, Petitioner's counsel's ability to more fully cross examine Leslie Green's sister and State witness, Jenny Slosher. Petitioner says that if she was aware of the on-going negotiations, her counsel would have engaged in probing, in-depth cross examination of Stewart Green, Leslie Green, and Jan Adams to demonstrate that they were not full, complete and accurate in their testimony.

Your Petitioner says the issue in State vs. Stewart, 239 S.E.2d 777 (W.Va., 1977) is similar to the issue in the case at bar. In State vs. Stewart, supra, this Court reversed the defendant's conviction for delivery of a controlled substance. Four months after the conviction new evidence was discovered that the principal witness for the State, a West Virginia state trooper, derived his testimony from reports that he routinely altered and falsified. The Stewart Court held:

> "We feel that if the first four rules are satisfied in cases involving after-discovered impeachment evidence, where the impeachment goes to the key prosecution witness, then a new trial should be granted. The 'fifth rule' merely says that new and material impeachment evidence, discovered after trial, and not such that would have been secured before trial by due diligence, ordinarily is not the kind of evidence that

> satisfied the 'fourth rule' (i.e. it is not the kind of evidence 'that ought to produce an opposite result at a second trial on the merits.')"

In the case at bar, as in Stewart, supra, the newly discovered evidence impeached key prosecution witnesses. Petitioner submits she was denied a fair trial because the jury was deprived of considering whether the on-going negotiations between the "DHS" and the Green's counsel regarding the Greens regaining custody of Julia was in any way an inducement for the Green's to falsify their testimony against Petitioner.

In State vs. Wolfe, 277 S.E.2d 640 (W.Va., 1981) this Court reversed the defendant's conviction of grand larceny on the basis that the defendant was entitled to a new trial because of newly

discovered impeachment evidence. The State's key witness gave testimony at a subsequent trial which was materially different from testimony that he gave against the defendant. The subsequent testimony of the key witness related to a critical fact going to the issue of intent on the part of the defendant. The Wolfe Court held it was reasonable to conclude that the jury might have reached a different conclusion as to the guilt or innocence of the defendant had they had the facts which the key witness testified to in another trial.

Another case similar to the case at bar is the United States Supreme Court case of Giglio vs. United States, 405 U.S. 150 (1972) discussed by this Court in State vs. Stewart, supra. In Giglio, supra, defense counsel discovered after trial that a United States attorney

promised the government's key witness that he would not be prosecuted if he testified against the defendant before a grand jury. At trial, the key witness specifically said that nobody told him that he would not be prosecuted. The government's trial attorney told the jury that the key witness received no promises that he would not be indicted. The United Supreme Court reversed Giglio's conviction because the key witness's credibility was an important issue in the case:

> "Any evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know of it."

Clearly, in the case at bar as in Giglio, supra, the jury was entitled to know whether the State had an understanding or agreement with a witness or

a witness's attorney specifically, Stewart and Leslie Green as to regaining custody of their child.

The recent United States Supreme Court of United States vs. Bagley, supra, supports Petitioner being awarded a new trial. In Bagley, supra, the defendant Bagley was indicted on charges of violating federal narcotics and firearms statutes. Before trial he filed discovery motions requesting information on any deals made to government witnesses in exchange for their testimony. The government denied any such deals had been made to its witnesses. After trial, Bagley learned that prior to trial two principle government witnesses had signed contracts with the government to receive money if they provided information to the satisfaction of the government.

Following the trial the government paid Three Hundred Dollars ($300.00) to each of the two principle government witnesses. The Bagley Court held that the suppression of impeachment or other exculpatory evidence amounts to constitutional error requiring reversal "if such evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."

Petitioner submits that in applying the Bagley rule to the facts of her case, it is clear that the evidence suppressed would undermine confidence of the outcome of the trial. Petitioner submits that if the jury was aware that simultaneous with the Green's revelation of the "new story" there were these on-going negotiations surely such information would have undermined confidence in the Green's credibility.

Your Petitioner submits that the last minute disclosure and testimony about your Petitioner's son abusing his child and the conspiratorial coverup was devastating to her case. The believability of this evidence would have been affected by the disclosure that simultaneous with the Greens first mentioning these facts negotiations had just begun about returning to them custody. See also Hoover vs. State, 714 F.2d 301 (4th Cir., 1983), Chavis vs. North Carolina, 637 F.2d 213 (4th Cir., 1980), U.S. vs. Sutton, 542 F.2d 1239 (4th Cir., 1976), and Boone vs. Paderick, 514 F.2d 414 (4th Cir. 1976).

Petitioner also says that Judge Fox implied a too narrow test in deciding that the record did not demonstrate that newly discovered evidence existed. According to his letter of September 24,

1986, he concluded that there was no evidence that the Greens had ever spoken to "DHS" or the prosecutor. Petitioner acknowledges this fact, but submits that Judge Fox appears to be overlooking the fact that their counsel was involved in these negotiations and what is attributed to counsel should be attributed to the Greens. See: Boone vs. Paderick, supra. Petitioner submits that if the trial court or the State is of the opinion that what was being discussed between the Green's counsel and the State is not attributable to the Greens, then Judge Fox's original Order of August 1, 1986, should be followed, wherein he directed that an evidentiary hearing be held.

Clearly, at a minimum the record should be developed as to whether or not the on-going discussions and

negotiations that proceeded your Petitioner's trial were communicated to the Greens to determine if their state of mind was affected in any way by these negotiations, and/or was the development of the long suppressed story about your Petitioner's son's abuse reality or the produce of the negotiations. See also: State v. Jones, 161 W.Va. 55, 239 S.E.2d 763 (1977)

Petitioner would point out to the Court that following a remand from the United States Supreme Court to the Ninth Circuit, the Court in Bagley vs. Lumpkin, (9th Cir. 82-3033) decided September 2, 1986, 30 Cr. L. 2472, again held that the government's failure to disclose material impeachment evidence "undermined confidence in the outcome of the trial" and again reversed the conviction.

II. THE TRIAL COURT ERRED BY REFUSING TO ALLOW PETITIONER'S COUNSEL TO EXAMINE THE "DHS" RECORDS TO ARGUE WHY THE RECORDS SUPPORT PETITIONER BEING AWARDED A NEW TRIAL IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW PURSUANT TO ARTICLE 3, §10 OF THE WEST VIRGINIA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The tiral court refused to allow Petitioner's counsel to review the "DHS" records. The trial court examined the records to determine whether there exists evidence to support awarding Petitioner a new trial.

In State ex rel Preissler vs. Dougherty, 273 S.E.2d 574 (W.Va., 1980) the defendant sought to prohibit his trial on a misdemeanor charge unless certain subpoenaed documents in

possession of the West Virginia Judicial Inquiry Commission be made available to him. The Judicial Inquiry Commission claimed the documents were confidential. The Preissler Court held:

> "We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality [as contrasted to questions of national security], it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated specific need for evidence in a pending criminal trial."

Recently, the issue herein was considered by the Pennsylvania Supreme Court in Commonwealth vs. Ritchie, 502 A.2d 148 (Pa., 1985) cert. granted, ___ U.S. ___, ___ S.Ct. ___, 39 Cr.L. 4059. In Ritchie, supra, the defendant was charged with sexually molesting his

minor daughter over a period of years. In the course of preparing for trial, the defendant's attorney subpoenaed Child Welfare Services (CWS) for records pertaining to the girl. The CWS claimed the records were confidential and refused to produce them. The trial court after an in-camera inspection of the records, made available to the defendant only those parts of the file which it determined to constitute verbatum statements (or the equivalent) by the girl regarding abuse. Defense counsel was permitted access to the entire record reviewed in-camera by the trial court, in order to argue relevance. The Pennsylvania Supreme Court held:

> "..., we must conclude that the trial court erred in refusing defendant access to the CWS files. We find that the Commonwealth's interest in

> maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross examine the witnesses against him. We agree with defendant that it would be absurd to read the statute as providing that the records be made available to a court of competent jurisdiction, while denying any use of them to the litigants in a criminal case before such courts."

Clearly, under the analysis set forth in Preissler, supra, and Ritchie, supra, the trial court in the case at bar committed reversible error by refusing to allow Petitioner's counsel access to the "DHS" records to show why the records support Petitioner being awarded a new trial. Petitioner submits her counsel, as an advocate, may view the "DHS" records in a different perspective than the trial court, and be in a position to explain to the Court when reviewing same how the documents would

be relevant and material. Petitioner therefore says she was denied her fundamental constitutional right to present evidence in support of her motion for new trial based on newly discovered evidence.

Wherefore, Petitioner moves that the matter be remanded to the trial court to allow Petitioner's counsel to review in its entirety the "DHS" records and directing the trial court to conduct an evidentiary hearing to determine the degree and extent of on-going negotiations between the State of West Virginia and the Green's counsel both preceding and during the trial of Petitioner's case, and whether same was communicated to them.

DOROTHY McCLELLAN
BY COUNSEL

/s/ Steven M. Askin/pjb

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/s/ David P. Greenberg
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CERTIFICATE OF COUNSEL

We, Steven M. Askin and David P. Greenberg, as attorneys for the Petitioner, says that the facts alleged in the Petition for Appeal are faithfully represented and that they are adequately presented to the best of our ability.

Steven M. Askin

/s/ David Greenberg
David P. Greenberg

Taken, subscribed, and sworn to before me this 10th day of October, 1986.

/s/ Lori A. Sine
Notary Public

My Commission expires: April 9, 1996 .

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS. CRIMINAL NOS. 84-F-58 &
84-M-3

DOROTHY McCLELLAN,

DEFENDANT

MOTION FOR NEW TRIAL

NOW COMES THE DEFENDANT, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure, and moves the Court to award her a new trial on the ground of newly discovered evidence. Said newly discovered evidence is as follows:

On the ___ day of February, 1986, this Court Ordered, without objection by the State, that the custody and control of Julie Green, infant, be returned to her natural parents, Stuart and Leslie Green. At the trial in this matter before the jury on November 7, 1984,

through November 9, 1984, witnesses, Leslie Green, Stuart Green, and Jan Adams, testified that there was no arrangement concerning the return of Julie Green to the custody of Stuart and Leslie Green. (Tr. pp. 505-506, 517, 568-569, 596, 604.)

Defendant moves the Court for an evidentiary hearing concerning the circumstances of the State of West Virginia agreeing to return Julie Green to the custody of Stuart and Leslie Green. Defendant further moves the Court for a written transcript of all proceedings regarding the return of Julie Green to the custody of Stuart and Leslie Green.

The Defendant says that information regarding the arrangement for the return of Julie Green to the custody of Stuart and Leslie Green was discovered by her

since the trial; that the evidence is material; that the evidence is such as ought to produce an opposite result at a second trial on the merits.

DOROTHY McCLELLAN
BY COUNSEL

/s/ Steven M. Askin
Steven M. Askin
Attorney for Defendant
ASKIN, PILL, SCALES & BURKE, L.C.
P. O. Box 1938
Martinsburg, WV 25401
(304) 263-0909

CERTIFICATE OF SERVICE

I, Steven M. Askin, attorney for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing MOTION upon the Plaintiff by mailing same to Michael Thompson, Prosecuting Attorney for Jefferson County, at his address of County Building, Charles Town, West Virginia, 25414, by United States first class mail, postage prepaid this ____ day of July, 1986.

/s/ Steven M. Askin
Steven M. Askin

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

V. CASE NO. 84-F-58 & 84-M-3

DOROTHY MCCLELLAN,

DEFENDANT

O R D E R

This 1st day of August, 1986, came the State of West Virginia by Jefferson County Prosecuting Attorney, Michael Thompson, and came the Defendant in person and by counsel, Steven M. Askin, all appearing this day before the Honorable Fred Fox, Special Judge selected by the Supreme Court of Appeals to preside in this matter.

Thereupon, the Court proceeded to consider Defendant's motion to set aside the verdict of the jury on the grounds of newly discovered evidence and upon

counsel for Defendant explaining to the Court the necessity for review by either counsel for the Defendant and/or the Court of the records of the West Virginia Department of Human Services regarding whether or not there were on-going negotiations regarding whether the infant, Julia Green, should be returned to her natural parents or the parents of Stewart and/or Leslie Green as reflected by written documents contained in the Department of Human Services file and due to the voluminous records that were brought this day to Court by a representative of the Department of Human Services pursuant to a subpoena duces tecum issued from the Office of the Clerk of this Court, it is the opinion of the Court to continue all matters regarding the motion to set aside the verdict on the grounds of

newly discovered evidence to permit the Court to receive copies of all Welfare Department records involving the dependent and neglect proceeding of Stewart and Leslie Green and the infant child, Julia Green, and that copies of the records be provided to the Court in Fairmont, West Virginia, following which the Court will examine same to determine whether or not there are any letters, correspondence, written records, or other documents or memorandum reflecting discussions about and/or understandings reached about the transfer of custody of the infant child, Julia Green, to her parents prior to the trial of the Defendant, which occurred on the 7th day of November, 1984, to which action of the Court the State objected and excepted.

Thereupon, counsel for Defendant moved the Court to continue Defendant's bail until the issue of whether a new trial should be awarded to the Defendant on newly discovered evidence, which motion for continued bail was objected to by the State and it is the opinion of the Court to grant said motion to continue bail for a period of forty-five (45) days from this date to permit the Court to review the records and documents of the Department of Human Services and thereafter notify counsel for the Defendant and counsel for the State whether an evidentiary hearing will be necessary on the issues raised by said motion.

Thereupon, the Court proceeded to consider the motion to reduce sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure and

received into evidence letters written by the Defendant's children and upon receiving argument by counsel for the Defendant and counsel for the State, and upon the Defendant exercising her rights to allocution, the Court will reserve ruling on the motion to reduce sentence pending an opportunity to review the letters of the Defendant's children offered and accepted into evidence this day and it is the opinion of the Court to enter an Order regarding whether a new trial should be awarded and/or further hearings be held upon said motion for new trial and whether the Defendant's motion to reduce sentence should be granted and that a copy of said order will be provided to counsel for the Defendant and counsel for the State, notifying the Defendant of the Court's ruling.

The Clerk shall enter the foregoing as of the day and date first above written.

/s/ 25 Sem. 86

/s/ Fred Fox, II
THE HONORABLE FRED FOX, JUDGE

STATE OF WEST VIRGINIA

SIXTEENTH JUDICIAL CIRCUIT

24 September 1986

Steven M. Askin, Esq.
P. O. Box 1938
Martinsburg, WV 25401

Michael D. Thompson
Prosecuting Attorney
P. O. Box 729
Charles Town, WV 25414

RE: STATE V. McCLELLAN
CASE NOS. 84-F-58, 84-M-3

Gentlemen:

With regard to defendant's Motion for New Trial (on the ground of newly discovered evidence), I have received and reviewed copies of the entire Department of Human Services file regarding the "Stonegate" matter. I would estimate this file to contain approximately 1800-2000 pages, and my review consumed twenty-two (22) plus working hours between receipt of the file on 28 August 1986 and 23 September

1986. As one might imagine, the file contained a certain amount of repetition, and considerable material which did not have any bearing on the issue at hand. However, I did review the entire file.

Additionally, I have considered the matters raised at the hearing of this matter on 1 August 1986, and Mr. Askin's letter of 10 September 1986. I did not review the entire trial transcript as it was not available to me here in Fairmont; however, I recall the testimony which goes to the issue in question.

I found nowhere in the Department of Human Services file any indication that there was an "arrangement" concerning the return of Julie Green to the custody of her parents in return for the

parents' testimony for the State. Certainly during the period of the McClellan Trial (7 November 1984 through 9 November 1984) and prior thereto, the Greens, as well as most of the other Stonegate parents, were working with the Department toward regaining legal custody of their infant children. However, I found no evidence that the Department had even discussed with Stuart or Leslie Green their testimony as against the defendant, Dorothy McClellan, much less any arrangement, promise or commitment concerning same. There is no basis on which to believe that their denials of an arrangement were anything less than truthful. Accordingly, I find no newly discovered evidence which would warrant the granting of a new trial, and the Motion shall be denied.

With regard to the Motion to Reduce Sentence, I have considered the evidence adduced at the 1 August 1986 hearing, and the statements of defendant's children submitted in support thereof. I am still of the opinion that the sentence levied in this case was proper and warranted by the circumstances of the case. At that time of sentencing I stated: "I realize that a prison sentence will work a severe hardship on her (the defendant's) family and loved ones, who did nothing to deserve same. However, the violent death of a twenty-three month old baby, under the circumstances of this case, deserves nothing less than a penitentiary sentence." I am still of the same mind and will, therefore, deny the Motion to Reduce Sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure.

The State is requested to prepare an Order immediately reflecting these rulings and present same to opposing counsel for approval and forward same to me for entry. The Order shall further direct the defendant to surrender herself to the Sheriff of Jefferson County on or before 9:00 a.m., 15 October ±986, for incarceration and subsequent transfer to the State Penitentiary.

Very truly yours,

/s/ Fred L. Fox, II

Fred L. Fox, II

leg

ccs: Donald Giardini, Sheriff
of Jefferson County

court file (w/enclosures)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 7th day of November, 1986, the following order was made and entered, to-wit:

State of West Virginia, Plaintiff Below,

Respondent

vs.

Dorothy McClellan, Defendant Below,

Petitioner

On a former day, to-wit, October 21, 1986, came the petitioner, Dorothy McClellan, and presented to the Court her petition with exhibits, praying for an appeal from a judgment of the Circuit Court of Jefferson County rendered on the 24th day of September, 1986, as therein set forth. Upon consideration whereof, the Court is of opinion to and doth hereby order that this proceeding

should be, and the same is hereby, treated as a writ of habeas corpus, returnable to Jefferson County Circuit Court, for the purposes of permitting counsel to examine the Department of Human Services records.

It is further ordered that the Clerk of this Court is directed to promptly transmit by certified mail two copies of the petition filed in this office in this proceeding on October 21, 1986, together with copies of this order, to the Clerk of the Circuit Court of Jefferson County, Charles Town, West Virginia, for further proceedings in that Court, as provided in Chapter 53, Article 4A of the Code of West Virginia, as amended by Chapter 85, Acts of the Legislature, 1967.

A True Copy

Attest: _____
Clerk Supreme Court of Appeals